LAW OFFICES
KOTEEN & NAFTALIN, L.L.P.
1150 CONNECTICUT AVENUE
WASHINGTON, D.C. 20036-4104

TELEPHONE
(202) 467-5700
TELECOPY
(202) 467-5915

BERNARD KOTEEN*
ALAN Y. NAFTALIN
ARTHUR B. GOODKIND
GEORGE Y. WHEELER
MARGOT SMILEY HUMPHREY
PETER M. CONNOLLY
CHARLES R. NAFTALIN
JULIE A. BARRIE
* SENIOR COUNSEL

August 9, 1999

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie Roman Salas, Esq.
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Room TW-A325
Washington, D.C. 20554

Re: CC Docket No. 98-92

Dear Ms. Salas:

Transmitted herewith, on behalf of TDS Telecommunications Corporation (TDS TELECOM), are an original and 12 copies of its reply to the opposition to TDS Telecom's Petition for Reconsideration, CC Docket No. 98-92, filed by Hyperion of Tennessee, L.P.

In the event of any questions concerning this matter, please communicate with this office.

Very Truly Yours,

Margot Smiley Humphrey

Margot Smiley Humphrey

Enclosure

No. of Copies rec'd 0+12
List ABCDE

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
AVR, L.P. d/b/a	)	
Hyperion of Tennessee, L.P.	)	
Petition for Preemption of	)	
Tennessee Code Annotated	)	CC Docket No. 98-92
§ 65-4-201(d) and Tennessee	)	
Regulatory Authority Decision	)	
Denying Hyperion's Application	)	
Requesting Authority to	)	
Provide Service in Tennessee	)	
Rural LEC Service Areas	)	

REPLY OF TDS TELECOMMUNICATIONS CORPORATION

TDS Telecommunications Corporation (TDS Telecom), with and on behalf of its four wholly-owned subsidiaries in Tennessee[1] and by its attorneys, files this reply in response to the opposition to TDS Telecom's Petition for Reconsideration filed by Hyperion in the above-captioned proceeding.[2]

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[1] Tennessee Telephone Company (Tennessee Telephone), Concord Telephone Exchange, Inc., Humphreys County Telephone Company and Tellico Telephone Company.

[2] Hyperion claims (p. 2) that TDS Telecom's reconsideration request fails to provide new arguments or evidence, as it claims Section 1.106(b)(1) of the Rules requires. The Commission's Public Notice of the petition, Report No. 2344 (July 9, 1999), confirms that the applicable rule is section 1.429, which has no such provision. Even if section 1.106 applied, it does not so restrict reconsideration, and the case Hyperion cites (n. 3) merely affirms that a Bureau decision on delegated authority that a petitioner had not met its burden of proof to show compliance was correct on the original record and that nothing was added upon reconsideration that "brings into question" the Bureau's decision.

The Commission Has Unlawfully Gutted Statutorily Reserved State Authority to Protect Consumers Solely Because the Reservation Is an Exception to Section 253

Hyperion berates TDS Telecom (p. 3) for not "recognizing" that the statutory requirement for competitive neutrality supports the Commission's "determination that it is unable, as a matter of law, to consider the potential benefits [of the Tennessee law] for universal service or other public interest considerations." And it is true that the Preemption Order holds (paras. 12, 14. 17, 18) that a section 253(b) "exception" cannot be justified and preemption is mandatory for a requirement that "shield[s] the incumbent LEC from competition by other LECs," even as a "moratorium," and that "because [the law] favors incumbent LECs with fewer than 100,000 access lines by preserving their monopoly status, it raises an insurmountable barrier against potential new entrants in their service areas and therefore is not competitively neutral." Indeed, the Commission says (para 18) it "need not reach the question" whether the requirement is necessary for universal service and consistent with section 254 (although it contradicts the state on what is "necessary," totally without factual analysis, because it is "doubtful" that excluding competition in a rural area is ever necessary). The Commission even concludes (ibid.) that "by requiring competitive neutrality, Congress has already decided ... outright bans [or consumer protection delays] of competitive entry are never necessary" for universal service "within the meaning of section 253(b)."

The fatal flaw in this reasoning is that it writes section 253(b) out of the Act. But the Act's language and structure show that Congress enacted it as an exception or "reservation of state authority" which would otherwise have been eliminated by section 253(a). The plain

language of section 253(a) and (d) requires preemption of any law that "prohibits the ability" (emphasis added) of an entity to provide service -- that is, any statute, regulation or requirement that prevents someone from providing service. The law provides four exceptions to preemption in subsections (b), (c), (e) and (f). Logic dictates that an exception to this "Removal of Entry Barriers" provision that reserves state consumer welfare authority must permit, in appropriate cases, a state law that "prohibits the ability" of some entity to provide service, i.e., an "outright ban[ ]," on at least a temporary and "necessary" basis. Otherwise, the exception would be robbed of meaning, contrary to the fundamental tenet of statutory construction that "all parts of a statute, if at all possible, are to be given effect."[3] The 253(b) exception provides that "[n]othing in this section shall affect the ability of a State to impose" certain requirements that section 253 would otherwise preempt.

The Commission's interpretation of "competitively neutral," which it elevates (para. 18) to a supposed decision of Congress, however, rewrites the law to provide that a requirement that "prohibits the ability" to provide service is never "necessary" to preserve universal service -- even to preserve universal service temporarily until measures are put in place to prevent non-competitively neutral, unequal competition from undermining implicit support. If a lawful exception to section 253 can never "prohibit ... the ability" of any competitor,[4] i.e., if any

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[3] See, e.g., Weinberger v. Hynson, Westcott & Dunning, 412 U.S. 609, 633 (1973).

[4] Hyperion concedes (p. 4) that section 253(b) allows state action beyond those authorized by the section 253(f) exception. However, the Commission (n. 50) has relied on sections 251(f), 253(f) and 214(e)(2) to conclude that Congress enacted safeguards short of exclusion of a competitor, and a state cannot go further. If these other safeguards mark the boundaries of Congress's intent to mitigate competitive impacts on universal service, why did Congress find it necessary to enact 253(b), an additional universal service safeguard deferring to

divergence from the prohibition requires preemption, a state cannot take advantage of the statutory exception unless its law or action is consistent with section 253(a), that is, unless no exception is necessary. Thus, Hyperion's complaint (p.3) that giving effect to the statutory exception in Tennessee would leave the preemption procedures "meaningless" is mistaken because it is the section 253(b) reservation of state authority that is meaningless if it permits no deviation from section 253(a) and (d).

Aside from the legal and logical failures of such a reading, the Commission's interpretation places the public policy purposes of subsection (b), which preserves state "ability" to protect the four specified public needs, behind the supposedly paramount pro-entry purpose. But the Act's dual purpose, also evidenced in sections 214 (e), 251(f), 253(f) and 254 -- establishing competition without hampering universal service -- requires the Commission to construe and apply subsection (b) as an exception carved out of the Act's competition mandate to safeguard consumers when a state can show that it is "necessary."

The Impossibility of Simultaneous Implementation of Universal Service Reform and the 1996 Act's Pro-Competitive Measures Justifies Tennessee's Moratorium on Unregulated Entry

Hyperion asserts (p. 5) that the Commission can only look at whether the "requirement" is competitively neutral, not at the "effect" of preemption. But Hyperion has turned TDS Telecom's argument and the purpose of section 253(b) backwards. The TRA enforced the Tennessee law by temporarily denying Hyperion entry (pending biennial review of the Tennessee

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appropriately exercised state authority, as an exception to its "no prohibiting entry" provision?

law) because (a) Tennessee Telephone and other small and rural telephone companies in the state have universal service and carrier of last resort obligations which do not apply to Hyperion, and (b) Hyperion's entry prior to completion of universal service mechanisms that are sustainable in tandem with competition would undermine the existing mechanisms. The point is not that preemption "would result in competitive incongruities," but that immediate unregulated entry would undermine Tennessee Telephone's ability to provide universal service under the current system. Hence, the differences in the two carriers' universal service duties both provide the compelling reason that delaying Hyperion's entry is "necessary to preserve and advance universal service" and demonstrate that the TRA's decision is also necessary to fend off a harmful violation of the competitive neutrality principle. It would be more "competitively neutral" than preempting the Tennessee law to let the TRA delay authorization to Hyperion to enter with the competitive advantages conferred by freedom from Tennessee Telephone's universal service and other regulatory responsibilities until universal service reforms are implemented to prevent the adverse consumer impacts of Hyperion's planned unrestricted cream-skimming. Indeed, because implementation of the 1996 Act's competitive and universal service policies cannot be accomplished simultaneously, temporarily delaying Hyperion's authority is the only way for the TRA to preserve both universal service and competitive neutrality and to maintain the implicit support flows that currently achieve universal service.[5]

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[5] While it is true that the 1996 Act placed a shorter time limit on initial implementation of section 251 than section 254, as the Commission implies (n. 53), Congress set no deadline at all for implementing section 253, and section 252(g) permits states to consolidate proceedings under sections 214(e), 251(f), 252 and 253.

In a similar situation where competitors' interests clashed with consumers' needs, the Eighth Circuit upheld the Commission's decision to provide a transitional pricing step before implementing the cost-based pricing required by section 252(d)(1), while the Commission was reforming universal service. The court explained that failure by the Commission temporarily to include the implicit support in the challenged access charges while completing universal service reform would "threat[en] ... serious disruption in universal service," such that universal service would be "nothing more than a memory." [6] When, as here, the TRA invokes section 253(b) because universal service is threatened by non-competitively neutral entry, the Commission can lawfully -- and should -- allow Tennessee to adopt a transitional delay in Hyperion's entry until "universal service is funded by competitively neutral means."[7]

The Commission Did Not Follow Its Own Standards for Competitive Neutrality

Hyperion and the Commission read the phrase "competitively neutral" to deprive states of the power to "prohibit the ability" of any competitor, even temporarily -- even if its proposed service will destroy competitive neutrality and will imperil universal service and quality of service to the detriment of consumers. The Commission should follow its own standard for competitive neutrality and take into account Hyperion's huge competitive advantage and freedom from universal service obligations, which the state has said will impair existing federal and state support mechanisms while universal service reform is underway.

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[6] See, Competitive Telecommunications Ass'n v. FCC, 117 F. 3rd 1068, 1074 (8th Cir. 1997).

[7] Ibid.

The Commission repeatedly avows (paras. 16-18) an even-handed standard for competitive neutrality in the Preemption Order. It holds that section 253 and its legislative history do not even suggest "that the requirement of competitive neutrality applies only to one portion of a local exchange market ... and not to all carriers in that market." It also agreed (n.48) that "in order to qualify for protection under section 253(b), a state legal requirement need not treat incumbent LECs and new entrants equally in every circumstance." The Commission also renounced (para. 46) cost, competitive, profitability and regulatory (separations) advantages. But the Commission nevertheless assumed (para. 16) that the Tennessee law favors incumbents, although it never denies that (a)Tennessee incumbents must bear extensive public interest obligations that consumers depend upon that do not apply to Hyperion or (b) that the disparity will undermine Tennessee Telephone's implicit support flows. Rather than protecting the public from the harms of non-competitively neutral entry before universal service reform, the Commission has effectively held that no matter how different the obligations of incumbents and new entrants or how damaging the universal service impacts, it can never be competitively neutral to withhold or delay entry authority to a competitively advantaged carrier. Thus, the Commission has forsaken its own competitive neutrality standard to require that differently-circumstanced parties must immediately be treated "alike." A reasonable and consistent reading of "competitively neutral" simply cannot conclude that the Commission has "no choice" but to preempt Tennessee from even delaying entry, pending universal service reform, to a differently-

circumstanced applicant whose entry will jeopardize both (a) the state's (and the Commission's) universal service mechanisms and (b) the incumbent carrier's ability to recover its costs for the universal service it alone is obligated to provide. In short, the Commission has mandated exactly the kind of noncompetitively neutral treatment it purports to avoid.

The Commission Has Not Limited Its Preemption to the Minimal Extent Necessary to Correct the Violation It Attributed to the TRA's Interpretation

Hyperion claims that the Tennessee law has no "redeemable" portion. The Commission, however, did not hold that the TRA could not lawfully construe the Tennessee law to achieve its consumer protection purpose. The Commission agreed (para. 22) that state construction can determine "whether the statute is subject to preemption under section 253." However, it rejected TDS Telecom's explanation that the law should be left in place to allow the TRA to pursue the purpose of the law – temporarily protecting universal service in areas where unregulated entry would have especially severe impacts on universal service support flows -- by any means that is lawful under the 1996 Act. Instead, the Commission took the TRA's construction that the law requires denial of all applications as "dispositive." Reconsideration to limit preemption to "the enforcement of the statute" as subsection (d) instructs -- that is, preempting only the faulty construction -- would permit the TRA to seek less controversial means of safeguarding universal service in vulnerable areas until universal service reform is completed, consistent with the Tennessee legislature's intention to protect consumers in the areas served by Tennessee's small telephone companies.

Conclusion

Therefore, for the reasons in this reply and the petitions for reconsideration filed by TDS Telecom and the TRA, the Commission should reconsider and rescind, or at least substantially narrow, its preemption of Tennessee legislation and decisions seeking to protect consumers in the state.

Respectfully submitted,

TDS TELECOMMUNICATIONS CORPORATION

By: /s/ Margot Smiley Humphrey
Margot Smiley Humphrey

KOTEEN & NAFTALIN, L.L.P.
1150 Connecticut Avenue, N.W.
Suite 1000
Washington, D.C. 20036
(202) 467-5700
margot.humphrey@koteen.com

Its Attorneys

August 9, 1999

CERTIFICATE OF SERVICE

I, Victoria C. Kim, a secretary in the offices of Koteen & Naftalin, hereby certify that true copies of the foregoing TDS TELECOM's Reply to CC Docket No. 98-92 have been served on the parties listed below, via first class mail, postage prepaid on the 9th day of August, 1999.

*Magalie Roman Salas (one original, 12 copies)
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

*Janice M. Myles (one copy, w/diskette and cover letter)
Common Carrier Bureau
Federal Communications Commission
Room 5-C327
445 Twelfth Street, S.W.
Washington, DC 20554

*International Transcription Services, Inc. (ITS)
1231 20th Street, N.W.
Washington, DC 20036

Carla G. Fox
J. Richard Collier
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

Mr. K. David Waddell
Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

Dana Frix, Esq.
SWIDLER & BERLIN, CHTD.
3000 K Street, N.W., Suite 300
Washington, DC 20007-5116

*denotes hand delivery

Victoria C. Kim